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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

In re the Marriage of JENNIFER GREEN  
and FRANK J. GREEN, IV.

JENNIFER GREEN,

Appellant,

v.

FRANK J. GREEN, IV,

Respondent.

A139992

(Solano County  
Super. Ct. No. FFL-112576)

Appellant Jennifer Green (Mother) appeals from an order awarding custody of her three minor children (Minors) to respondent Frank J. Green, IV (Father), and directing her to pay fees for Minors' court-appointed attorney. We find the order nonappealable with respect to custody and visitation rights and dismiss that portion of the appeal. We reverse and remand the fee order.

**BACKGROUND**

Mother and Father married in 2002. Mother filed the instant dissolution action in 2009 and a contentious custody battle ensued. Initially, Mother had sole physical custody of Minors. Some months after a January 2012 judicial reassignment, a temporary custody order transferred sole physical custody to Father. Instead of complying with the order, Mother apparently fled with Minors to Canada. Minors were returned to Father and criminal charges were brought against Mother. Following this event, the trial court

issued a temporary custody order awarding sole legal and physical custody to Father with no visitation rights for Mother, although Mother was permitted telephone contact.

On July 31, 2013, the court was scheduled to hold a trial on all issues, including marital status, division of property, and custody. At the beginning of the hearing, Mother requested the trial court continue the trial as to custody because of her still-pending criminal charges. The court agreed and proceeded to trial on marital status and division of property.

In August 2013, the court issued a form judgment. The judgment dissolved the marriage and divided the parties' property. With respect to custody and visitation, the form judgment essentially continued the prior order but did not specifically state that custody issues were bifurcated from the judgment on status and property. The form judgment also incorporated and attached a 29-page written order. This order explained that, "[i]mmediately upon commencement of the hearing, [Mother] advised the court and parties that criminal charges continued to be pending against [Mother] and, as a result, she requested that the trial be bifurcated . . . . The Court agreed to defer any hearing on child custody or support issues, including [Mother's] request to modify custody and visitation." The order continued, "[a]s such, the Court is confirming existing custody orders awarding sole legal and physical custody of the children to [Father], with limited, supervised telephonic contact with [Mother]."

The trial court continued, "The[] [existing custody and visitation] orders were the culmination of a disturbing and protracted series of events raising serious concerns about [Mother's] fitness as a parent. For purposes of documenting and explaining this history and the factual basis for the orders, the Court provides the following summary and findings." The court went on to discuss, over more than 20 pages, the factual background of the custody dispute and proceedings, and the court's reasoning in awarding sole custody to Father.

The written order concluded: "The matter is continued to December 13, 2013 in this department for continued hearing on child custody, visitation and support orders. The custody orders contained in this order are not permanent within the meaning of

*Montenegro v. Diaz* (2001) 26 Cal.4th 249.<sup>[1]</sup> [¶] All other aspects of the judgment, including the termination of jurisdiction over spousal support, and the property orders culminating in an award in favor of [Father] of \$7,004.56 for equalizing property payments and reimbursement for costs and fees, are final.” (Boldface omitted.) This appeal followed.

## DISCUSSION

### I. *Custody and Visitation Order*

Mother appeals from the August 2013 custody and visitation order, arguing (1) the trial court was biased against Mother, (2) the trial court inappropriately relied on a theory of parental alienation, and (3) the trial court committed judicial misconduct by receiving ex parte information and conducting its own investigation. She asks this court to vacate the custody and visitation order and direct that further proceedings be held before a different judicial officer.

We asked the parties for supplemental briefing on whether the August 2013 custody and visitation order was appealable and/or moot. Having considered the parties’ supplemental briefs, we conclude the order is nonappealable.

As a general rule, interim or temporary custody orders are not appealable. (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 456.) Mother argues that the custody order here is appealable as a judgment because it is included on a form entitled “Judgment” and designated by the Judicial Council for use as a family law judgment. Mother also notes the written order includes more than 20 pages of findings and discussion about the custody and visitation order. We are not persuaded that these render the order final and appealable.

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<sup>1</sup> *Montenegro v. Diaz*, *supra*, 26 Cal.4th 249, provides that “a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification.” (*Id.* at p. 256.) This showing is not required to modify temporary custody orders. (See *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1053.)

“ ‘In “determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable . . . [i]t is not the form of the decree but the substance and effect of the adjudication which is determinative.” ’ ” (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.) “[I]t may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.” ’ [Citations.] A judgment [or order] is final ‘ ‘ ‘when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.’ ’ ’ [Citations.] ‘ “[W]here anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory” ’ and not appealable.” (*Id.* at pp. 1216–1217.)

The judgment incorporates a written order stating trial on custody and visitation had been continued. The written order further states the custody order was “not permanent within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249,” distinguishing it from “[a]ll other aspects of the judgment, . . . [which] are final.” Moreover, the order expressly contemplates further proceedings to determine custody, sets a date for a “continued hearing” on custody and visitation, and lists a number of issues on which the court would hear evidence at a future hearing. As more “ ‘ “in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties,” ’ ” the aspects of the August 2013 judgment and written order addressing custody and visitation are not appealable. (*In re Marriage of Corona, supra*, 172 Cal.App.4th at p. 1217.)

Mother asks, in the alternative, that we exercise our discretion to treat her appeal as a writ petition. (See *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400, 404 [“on a purported appeal from a nonappealable order, the appellate court has discretion to treat the appeal as a petition for an extraordinary writ within the appellate court’s original jurisdiction”].) We decline to do so.

“General principles of mootness apply to writ petitions.” (*Gridley v. Gridley* (2008) 166 Cal.App.4th 1562, 1588.) “ ‘ A case is moot when the decision of the reviewing court “can have no practical impact or provide the parties effectual relief.” ’ ” (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 78.)

Events taking place after the challenged order have rendered Mother’s challenges at least partially moot.<sup>2</sup> (See *County of Los Angeles v. Glendora Redevelopment Project* (2010) 185 Cal.App.4th 817, 830 [“ ‘ courts have not hesitated to consider postjudgment events when . . . subsequent events have caused issues to become moot’ ”].) First, in December 2013, the trial court issued a new temporary custody and visitation order. This order “confirm[ed] the current child custody orders with the following modification: Mother may have two supervised visits per month . . . .” Mother’s request that we vacate and remand the August 2013 order with respect to *visitation* has thus been rendered moot, as that aspect of the order has been superseded and is no longer in effect. The August 2013 order with respect to *custody* may also no longer be in effect; it is no longer the operative order, but instead has been incorporated into the subsequent order which is not before us. Second, following the August 2013 judgment and order, the underlying case was reassigned to a new judicial officer, and venue was subsequently transferred to San Diego County. This judicial reassignment renders moot Mother’s request that the case be

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<sup>2</sup> We grant Mother’s January 28, 2015 request for judicial notice with respect to the following records filed in the trial court: (1) December 13, 2013 order, (2) January 24, 2014 answer to statement of disqualification, and (3) July 25, 2014 order. We deny the remainder of this request, as well as the entirety of Father’s June 9, 2014 request for judicial notice and Mother’s March 8, 2014 request for judicial notice, as the documents are not relevant to our appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4.) We grant Mother’s unopposed motion to strike portions of Father’s appendix, as the challenged portions were not part of the trial court record at the time of the appealed order and we have denied Father’s request that we take judicial notice of certain of these documents. (*Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.)

reassigned on remand.<sup>3</sup> The partial and possibly complete mootness weighs against writ review. Mother's citation to cases granting writ review of non-moot issues is inapposite.

As the portion of the August 2013 judgment and order involving custody and visitation issues is nonappealable and we decline to exercise our discretion to treat the appeal as a writ petition, we will dismiss this portion of Mother's appeal.

## II. *Minor's Counsel's Fees*

In April 2012, the trial court appointed counsel for Minors. The trial court directed Father to make monthly payments toward Minors' counsel's fees. Following trial, the written order incorporated into the judgment included the following in the discussion of division of property: "In that appointment of counsel for the children was necessitated as a result of the conduct and attitudes of [Mother], [Mother] shall bear full responsibility for those costs. [Father] has already paid to said counsel \$5250, and he is entitled to 100% reimbursement of that amount as well as any amount paid by him for the children's counsel's fees in the future. The Court will retain jurisdiction to supplement the judgment with these additional fees in the future." Mother appeals this order, arguing the trial court erroneously failed to consider Mother's ability to pay. We agree.

We have jurisdiction over this appealable order, which was included in the final judgment on property division and is final as to Mother's liability to pay fees for Minors' counsel.

Before awarding compensation for counsel appointed by the court to represent a child in family law proceedings, "The court must determine the respective financial ability of the parties to pay all or a portion of counsel's compensation. [¶] (1) Before determining the parties' ability to pay: [¶] (A) The court should consider factors such as the parties' income and assets reasonably available at the time of the determination, and

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<sup>3</sup> We note that, to the extent Mother challenges the findings set forth in the August 2013 custody order, these findings are not binding on the new judicial officer in future proceedings. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [law of the case doctrine applies only to appellate decisions].)

eligibility for or existence of a fee waiver under Government Code section 68511.3<sup>4</sup>; and [¶] (B) The parties must have on file a current Income and Expense Declaration (form FL-150) or Financial Statement (*Simplified*) (form FL-155).” (Cal. Rules of Court, rule 5.241, subd. (b).)

Mother had an existing fee waiver and her most recent Income and Expense Declaration on file was from 2010. The written order incorporated in the judgment gives no indication that the trial court considered her ability to pay Minors’ counsel’s fees. We will reverse that aspect of the judgment and remand for the determination required by California Rules of Court, rule 5.241, subdivision (b).

#### DISPOSITION

The appeal from the August 2013 custody and visitation order is dismissed. The portion of the August 2013 judgment and order directing Mother to pay fees to Minors’ counsel is reversed and remanded for further proceedings.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.

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<sup>4</sup> Government Code section 68511.3 has been repealed and replaced with Government Code section 68630 et seq. (Stats. 2008, ch. 462, §§ 1-2, eff. July 1, 2009.)